

DD (a-1) one or more antifungals inhibiting fungal ergosterol biosynthesis as a first active ingredient,

(a-2) a amphoteric phospholipid as a second antifungal active ingredient, and

(b) at least one surfactant, wherein said composition is formulated as a shampoo.

REMARKS

Reconsideration of the captioned application as amended herewith is respectfully requested.

This amendment is filed concurrently with a request for a **one (1) month** extension of time to respond to the Office Action.

The Office Action rejected claims 1 – 19 under 35 USC §103 as unpatentable over United States Patent No. 5,456,851 to Liu ("Liu"), United States Patent No. 5,536,742 to Mason, ("Mason"), individually or in combination, and further in combination with United States patent No.: 5,688,496 to Fost ("Fost '496"), United States Patent No. 5,648,348 (Fost '348"), and United States Patent No. 5,164,375 to Vanmiddlesworth ("Vanmiddlesworth"). Claims 1 to 19 remain pending in the application after entry of this amendment.

Claim 1 and claim 6 were amended to clarify that the phospholipid is "a second antifungal agent." Support for this amendment may be found in the Specification as originally filed at, for example, page 4, lines 31 - 34, and as such does not introduce new matter into the application under 37 CFR 1.121

Attached hereto is a marked-up version of the changes made to the claims by the current amendment. The attached page is captioned, "Version with markings to show changes made."

The Rejection of Claims 1 – 19 under 35 USC §103(a) as Being Unpatentable Over Liu and/or Mason, and Further Over Fost '496, Fost '348, or Vanmiddlesworth Should Be Withdrawn

Claims 1 – 19 stand rejected under 35 USC §103(a) as being unpatentable over Liu and/or Mason individually or in combination, further in combination with Fost '496, Fost '348, or Vanmiddlesworth. Applicants respectfully disagree for the reasons that follow.

As stated in the Office Action, both Liu and Mason neither disclose nor suggest the use of phospholipids, let alone the use of the particular "antifungal" amphoteric phospholipids as claimed in claim 1 and claim 6.

Applicants respectfully submit that there is neither a disclosure nor a suggestion in either Fost reference or Vanmiddlesworth to include the phospholipids disclosed in such references, respectively, in the antifungal-containing compositions of Liu or Mason. Moreover, given the fact that the compositions of Liu and Mason already include an antifungal component, Applicants respectfully submit that there is no disclosure or suggestion in either Liu or Mason to further include yet another antifungal compound, let alone the particular antifungal phospholipids of Fost '348 or Vanmiddlesworth.

In order to properly combine two references for purposes of reaching a conclusion of obviousness, there must be some teaching, suggestion, or inference in at least one of those references that would have directed one to combine the relevant teachings of such references. See Ex parte Levengood, 28 USPQ.2d 1300 (BPAI) and Ashland Oil v. Delta Resins and Refractories, Inc. 227 USPQ 657 (Fed. Cir 1985). Both the suggestion to make the claimed composition, as well as the reasonable expectation of success must be founded in the prior art and not in Applicant's specification. See In re Vaeck, 20 USPQ.2d 1438 (Fed. Cir. 1991).

According to the Office Action, the phospholipids for Fost '496 possess properties such as foaming, cleansing, and the like. However, Fost '496 neither discloses nor suggests that its phospholipid compounds also possess antifungal properties. The Office Action then relied upon a different Fost reference, i.e., Fost '348, for the disclosure of a very specific phospholipid that possesses antifungal properties. However, those specific phospholipids of Fost '348 have a structure that is different from the phospholipids disclosed in Fost '496. Therefore, Applicants respectfully submit that there is neither a disclosure nor a suggestion in Fost '348 to include antifungal phospholipids in the antifungal-containing compositions of Liu or Mason because: 1) Fost '348 is silent regarding the foaming, cleansing, conditioning properties of its antifungal phospholipids; 2) Fost '496 does not disclose that its foaming, cleansing phospholipids, which differ in structure from the phospholipids of Fost '348, also possess antifungal properties; and 3) there is no disclosure or suggestion in Liu or Mason to further include an antimicrobial agent, let alone the particular antifungal phospholipids of Fost '348. Moreover, given the fact that the compositions of Liu and Mason already include an antifungal component, Applicants respectfully submit that there is no disclosure or suggestion in either Liu or Mason to further include yet another antifungal compound, let alone the particular antifungal phospholipids of Fost '348.

In view of the above, Applicants respectfully submit that claim 1 and claim 6 are patentable over Mason and/or Liu and further in combination with Fost '496, Fost '348, and Vanmiddlesworth, and that the rejection of claim 1 and claim 6 under 35 USC §103(a) has been overcome and should be withdrawn.

Claims 2 – 5, 14, and 19, which depend upon claim 1 and incorporate all its limitations therein, and claims 7 – 18 which depend upon claim 6 and incorporate all of its limitations therein, are likewise patentable over Mason and/or Liu and further in combination with Fost '496, Fost '348, and Vanmiddlesworth, and that the rejection of these claims under 35 USC §103(a) has also been overcome and should be withdrawn.

Moreover, claim 3, which is directed to a particular phospholipid, is neither disclosed nor suggested in either of the two Fost references. In particular, the phospholipids of these Fost references do not have the acyl group as does the claimed phospholipid.

In view of the fact that Applicants unexpectedly found that the claimed active ingredients unexpectedly possessed a synergistic effect on the growth of *M. furfur*, Applicants respectfully submit that none of the cited references disclose or suggest the creation of a composition containing the claimed active ingredients in quantities producing "a mutual synergistic effect on the inhibition of the growth of *Malassezia furfur*" as claimed in claim 4.

Because none of the references disclosed the combination of the claimed antifungal with the claimed amphoteric phospholipid, let alone the above mentioned synergistic effect exhibited by such a combination, Applicants further respectfully submit that none of the prior art references disclose or suggest the percentage amount of each claimed component as set forth in claim 5.

In addition, in view of the fact that none of the prior art references disclosed or suggested the claimed composition of claim 1, Applicants further respectfully submit that the process for making such a composition set forth in claim 14 is also neither disclosed nor suggested in the prior art.


In view of the arguments set forth above for claim 1 and claim 6, and the additional arguments set forth above for the dependent claims, Applicants further respectfully submit that the rejection of claims 1 to 19 under 35 USC §103(a) has been overcome and should be withdrawn.

Conclusion

It is submitted that the foregoing amendments and remarks place the case in condition for allowance. A notice to that effect is earnestly solicited.

Respectfully submitted,

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Version with Markings to Show Changes Made

IN THE CLAIMS:

The claims have been amended as follows:

1. (Three Times Amended) A body or hair cleansing composition comprising
 - (a-1) one or more antifungals inhibiting fungal ergosterol biosynthesis as a first active ingredient,
 - (a-2) a amphoteric phospholipid as a second antifungal active ingredient, and
 - (b) at least one surfactant other than a phospholipid.

6. (Three Times Amended) A composition comprising
 - (a-1) one or more antifungals inhibiting fungal ergosterol biosynthesis as a first active ingredient,
 - (a-2) a amphoteric phospholipid as a second antifungal active ingredient, and
 - (b) at least one surfactant, wherein said composition is formulated as a shampoo.